

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

LOUIS DANIEL SMITH, also known
as Daniel Smith, also known as Daniel
Votino,

Defendant.

NO: 2:13-CR-14-RMP-1

ORDER MEMORIALIZING
COURT'S ORAL RULINGS

BEFORE THE COURT is Defendant's Motion to Dismiss Count 1, **ECF No. 644**, and Defendant's Motion to Expedite hearing of the same, **ECF No. 645**. The Court heard oral argument on the motion at the final pretrial conference held on May 18, 2015, at 10:00 a.m. in Spokane, WA. Mr. Smith was present and represented by Assistant Federal Defender Matthew Campbell. The United States was represented by Christopher E. Parisi. The Court has reviewed the motions, all relevant filings, and is fully informed.

1 Defendant moved to dismiss Count 1 of the indictment on the basis that it is
2 duplicitous. ECF No. 644. Count 1 of the Indictment charges Defendant with
3 conspiracy to:

4 (a) commit an offense against the United States by introducing,
5 delivering for introduction, and causing the introduction and delivery
6 for introduction into interstate commerce, with the intent to defraud or
mislead, misbranded drugs (to wit: MMS), in violation of Title 21,
United States Code, Sections 331(a) and 333(a)(2);

7 (b) knowingly defraud the United States and its agencies by
8 impeding, impairing, and defeating the lawful government functions
9 of the United States Food and Drug Administration, specifically, the
10 FDA's duty to protect the health and safety of the public by ensuring
11 that drugs marketed and distributed in the United States are safe and
12 effective for their intended uses, manufactured in establishments
which are registered with the Secretary of Health and Human
Services, and that the labeling of such drugs bears true and accurate
information, including the name and place of business of the
manufacturer; and,

13 (c) import merchandise contrary to law, and to receive, conceal,
14 sell, and facilitate the concealment and sale of smuggled merchandise,
15 in violation of Title 18, United States Code, Section 545.

16 ECF No. 1 at 6. Each component of Count 1 is charged as a violation of 18

17 U.S.C. § 371, Conspiracy to Commit Offense or to Defraud United States.

18 ECF No. 1 at 6.

19 Defendant argues that Count 1 charges two separate offenses, and
20 therefore is prejudicial. ECF No. 644 at 1-3. Defendant contends that Count
1 is prejudicial to Defendant because the imposition of *Pinkerton* liability
could enable a jury to convict Defendant of conspiracy for smuggling based

1 on a finding that a co-conspirator conspired to commit misbranding. ECF
2 No. 644 at 2-3.

3 The United States argues that Count 1 does not charge Defendant with
4 two or three separate conspiracies, but rather, a single conspiracy with three
5 different objectives: (1) misbranding, (2) smuggling, and (3) defrauding the
6 United States. ECF No. 655 at 1-2. The United States contends that the
7 “three objects of the conspiracy are unified by a single agreement to profit
8 from the sale of an unapproved drug.” ECF No. 655 at 2.

9 In *Braverman v. United States*, the Supreme Court held that “[t]he
10 allegation in a single count of a conspiracy to commit several crimes is not
11 duplicitous, for ‘The conspiracy is the crime, and that is one, however
12 diverse its objects.’ ” *Braverman v. United States*, 317 U.S. 49, 54 (1942)
13 (quoting *Frohwerk v. United States*, 249 U.S. 204, 210 (1919)). The Court
14 distinguished a single continuing agreement with several objects from
15 “successive acts which violate a single penal statute” and “a single act which
16 violates two statutes.” *Id.* Instead, the Court stated that where a single count
17 alleges a conspiracy to commit several crimes, “[t]he single agreement is the
18 prohibited conspiracy, and however diverse its objects it violates but a single
19 statute, s 37 [sic] of the Criminal Code.” *Id.*

1 In later precedent, the Supreme Court distinguished *Braverman* from
2 cases in which one count of conspiracy charges violation of two different
3 conspiracy statutes. *Albernaz v. United States*, 450 U.S. 333, 339 (1981);
4 *see Am. Tobacco Co. v. United States*, 328 U.S. 781, 788 (1946).

5 Count 1 of the Indictment charges a violation of one statute, 18 U.S.C.
6 § 371, prohibiting conspiracies to commit violations of the law or defraud
7 the United States. Like the indictment in *Braverman*, Count 1 of the
8 Indictment in this case is not duplicitous. Any additional concerns regarding
9 unanimity of the verdict may be resolved by the use of a special verdict
10 form.

11 Accordingly, **IT IS HEREBY ORDERED:**

- 12 1. Defendant's Motion to Expedite, **ECF No. 645**, is **GRANTED**.
13 2. Defendant's Motion to Dismiss Count 1, **ECF No. 644**, is **DENIED**.

14 The District Court Clerk is directed to enter this Order and to provide copies
15 to counsel.

16 **DATED** this 18th day of May 2015.

17
18 s/ Rosanna Malouf Peterson
19 ROSANNA MALOUF PETERSON
20 Chief United States District Court Judge